STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 13, 1999
v	No. 209512 Wayne Circuit Court
JESSIE E. JONES, Defendant-Appellant.	Criminal Division LC No. 96-006438

Before: Sawyer, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree murder, MCL 750.317; MSA 28.549, assault with intent to murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to concurrent terms of seventeen to twenty-five years in prison on the murder and assault convictions and to the mandatory consecutive two-year term on the felony-firearm conviction. He now appeals and we affirm.

Defendant's convictions arise out of the killing of Kyruden Robinson and the shooting of Kobieya Lilly. According to Lilly, he was walking along the street when he ran into his friend, Robinson. Lilly and Robinson went to the side of a house and began talking. Defendant came up and fired five shots at Robinson and then shot Lilly once. Lilly later identified defendant in a line-up. The autopsy showed that Robinson had been shot three times and died as a result of those gunshot wounds.

Defendant first argues that the trial court erred in allowing the prosecutor to cross-examine a defense witness concerning why the witness had not come forward earlier. Defendant, however, has not properly preserved this issue for appeal. Although an objection was made at trial, it was on the grounds of "asked and answered." It is well settled that an objection on one basis is insufficient to allow appellate review on a different basis. See, e.g., *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996).

Defendant next identifies as error requiring reversal three instances of alleged prosecutorial misconduct. First, defendant objects to certain statements by the prosecutor during the jury voir dire concerning the presumption of innocence. However, defendant did not object in the trial court.

Because we do not believe that any error in this regard would affect the outcome of the case or is of the nature where prejudice is presumed or reversal is automatic, we decline to consider the issue on appeal. *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). Defendant also failed to preserve for appeal his second alleged instance of prosecutorial misconduct, a reference during the prosecutor's opening statement to an altercation between the decedent and defendant on the day before the shooting. Therefore, we also decline to consider this issue.

Defendant's third allegation of prosecutorial misconduct is properly before us. Defendant argues that it was improper for the prosecutor to make reference during closing argument to the fact that defendant threw a book at the prosecutor. The incident is reported in the record as follows:

> *Court Reporter*: Look out!
>
> *The Court*: Watch out! Get him! Get him! (At this time Defendant Jones threw defense attorney's trial book at Mr. Wagner [the prosecutor], striking him in the head. Defendant's family restraining him with court officers.)
>
> *Ms. Jones-Gamble*: Sit down! Sit down! What the hell is wrong with you!?
>
> *Defendant Jones*: Fuck that bitch. I'm tired of y'all lying.
>
> *The Court*: Get him!
>
> *Mr. Green [defense attorney]*: Let me talk to him. Let me talk to him. Let me talk to him.
>
> *The Court*: Let the record show that the defendant just picked up a heavy blue book and threw it at the prosecutor. I think it hit the side of the prosecutor's head.
>
> Are you all right, Mr. Wagner?
>
> *Mr. Wagner*: I'm okay, your Honor.
>
> *The Court*: Mr. Green, is your client going to behave himself?
>
> *Mr. Green*: Yes, sir. Yes, he will.
>
> *The Court*: Are you ready to proceed with your argument?
>
> *Mr. Wagner*: I'm ready, your Honor.
>
> *The Court*: All right.
>
> *Mr. Wagner*: That, ladies and gentlemen, is the nice guy that we've been talking about. The nice guy.

It is the last comment which defendant claims was improper. Defendant may have preserved this issue for appeal by moving shortly thereafter for a mistrial.[1] The trial court did, however, offer to give a curative instruction, which defendant declined. The decision to grant or deny a mistrial is within the discretion of the trial court. *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995). The comment by the prosecutor was brief, relatively innocuous and certainly prompted by the defendant's own actions. Indeed, defendant did more harm to his defense by throwing the book than what may have been caused by the prosecutor's comment. Furthermore, to the extent that the prosecutor's comment was improper, the impropriety could have been cured by a cautionary instruction to the jury, which defendant declined. Therefore, we are not persuaded that the trial court erred in denying the mistrial.

Defendant next argues that he was denied a fair trial because the trial court should have sua sponte dismissed a juror for cause because she was employed as a deputy court administrator in the district court where defendant had been arraigned. We are aware of no rule requiring the trial court to sua sponte dismiss a juror for cause. The simple fact of the matter is, defendant did not challenge this juror for cause, did not exercise a peremptory challenge as to this juror, and stated at the end of juror selection, without having used all his peremptory challenges, that he was satisfied with the jury. It would appear that defendant was content at trial to have this juror serve. At the very best, this is unpreserved error not requiring reversal. *Grant*, *supra*.

Defendant next argues that the trial court erred in denying his motion for mistrial based upon juror misconduct. We disagree. Defendant argues that there was improper contact between a juror and the decedent's father.[2] First, we note that defendant mischaracterizes the incident. It was not contact between the father and the juror, but between the father and a friend or acquaintance of the juror, who related the conversation to the juror. The juror immediately informed the trial court, which conducted an in camera investigation. During that in camera interview of the juror involved, the details of the incident were revealed—that the juror's friend related a brief encounter with an individual identified as the victim's father. The juror was not told any information that had not come out at trial. Further, the juror at numerous points maintained that the conversation would have no affect on him and that he could continue to act fairly as a juror and reach a verdict based upon the evidence presented at trial.

Although defendant's brief indicates that he requested a mistrial, that too appears to mischaracterize the record. At most, defense counsel speculated over possible remedies:

> I don't know whether it's remedied by just excluding that juror and asking the others to deliberate. Or whether a mistrial should be declared by this Court. I don't know. But, it's obviously prejudiced the jury to the extent that they cannot be fair and render a fair verdict.

We note that this statement by defense counsel came *before* the in camera interview with the juror involved. After the in camera interview and the trial court's determination that the incident had not tainted the jury, defendant made no request for relief or objection to the jury continuing the deliberations. In the absence of any specific request for relief and that the record supports the trial

court's determination that the juror involved, and the entire jury for that matter, could deliberate to a fair and impartial verdict, we are satisfied that the trial judge handled this matter in an appropriate manner.

Defendant next argues that the trial court erred by requiring the exercise of multiple peremptory challenges before seating replacement jurors. Again, it appears that defendant is mischaracterizing the record. While the trial court clearly did allow the exercising of multiple challenges, defendant points to no place in the record where he was *required* to exercise multiple peremptories or prohibited from excusing a juror he had previously passed on.

The case at bar differs in an important respect from *People v Miller*, 411 Mich 321; 307 NW2d 335 (1981). In *Miller*, the defendant specifically objected to the process used before the jury selection began. *Id.* at 326. Here, defendant registered no such objection. Given that no objection was registered and that defendant was not obligated to exercise multiple challenges, or to exercise a peremptory challenge before the jury panel was reconstituted from prior challenges, we see no error requiring reversal. We do caution that a defendant may not be required to exercise a peremptory when there is less than a full jury box; we merely hold that it is not error requiring reversal where a defendant does not object to the method employed and he is merely *permitted* to exercise multiple challenges.

Defendant next argues that the trial court improperly allowed the use of evidence of other bad acts which allowed defendant to avoid arrest for over one year after the killing. Specifically, defendant objects to testimony by an investigating officer that defendant had eluded arrest. We are not persuaded that the issue was properly preserved for our review. During the cross-examination of earlier witnesses, defense counsel had highlighted the point that more than a year passed between the killing and the identification of defendant in a line-up. During the examination of Officer Smith, the prosecutor inquired into why it took so long to conduct the line-up. The officer testified that it was because defendant had evaded arrest.

The only objection raised by defendant was to the officer's conclusion that defendant had evaded discovery, in contrast to a mere failure by police to find defendant. The trial court sustained the objection, stating that the answer would be stricken unless a foundation for the conclusion was established. The prosecutor then proceeded, without objection, to take testimony from Officer Smith and establish the foundation. Defendant raised no further objection or request for relief. Therefore, we conclude that defendant has waived any further review of this issue. *Grant, supra*.

Defendant's final issue is that the verdict was against the great weight of the evidence. The basis of defendant's argument, however, is that the defense witnesses were more credible than the primary prosecution witness, Kobieya Lilly. We, however, leave to the jury to determine the credibility of witnesses. As the Supreme Court recently explained in *People v Lemmon*, 456 Mich 625, 642-644; 576 NW2d 129 (1998), it is only in very exceptional cases that witness credibility is a valid basis for finding that a jury's verdict is against the great weight of the evidence:

> We align ourselves with those appellate courts holding that, absent exceptional circumstances, issues of witness credibility are for the jury, and the trial court may not substitute its view of the credibility "for the constitutionally guaranteed jury

> determination thereof." *Sloan* [*v Kramer-Orloff Co*, 371 Mich 403, 411; 124 NW2d 255 (1963)]. We reiterate the observation in *Anderson v Conterio*, 303 Mich 75, 79; 5 NW2d 572 (1942), that, when testimony is in direct conflict and testimony supporting the verdict has been impeached, **f** "it cannot be said as a matter of law that the testimony thus impeached was deprived of all probative value or that the jury could not believe it," the credibility of witnesses is for the jury.
>
> Adding flesh to what is a more refined articulation of the formula that " '[i]n general, conflicting testimony or a question as to the credibility of a witness are sufficient grounds for granting a new trial,' " *United States v Garcia*, 978 F2d 746, 748 (CA 1, 1992), quoting with approval *United States v Kuzniar*, 881 F2d 466, 470 (CA 7, 1989), federal circuit courts have carved out a very narrow exception to the rule that the trial court may not take the testimony away from the jury. *Id*. at 470-471. Defining the exception, the federal courts have developed several tests that would allow application of the exception; for example, if the "testimony contradicts indisputable physical facts or laws," *id.*, "[w]here testimony is patently incredible or defies physical realities," *United States v Sanchez*, 969 F2d 1409, 1414 (CA 2, 1992), "[w]here a witness's testimony is material and is so inherently implausible that it could not be believed by a reasonable juror," *Garcia, supra* at 748, or where the witness' testimony has been seriously "impeached" and the case marked by "uncertainties and discrepancies." *United States v Martinez*, 763 F2d 1297, 1313 (CA 11, 1985).

Defendant has not pointed to anything in the case at bar to show discrepancies in the testimony that rise to such a serious level. Indeed, defendant's brief only points to two relatively minor items: that the initial description of the perpetrator differs from defendant's actual description,[3] and that Lilly testified that the perpetrator pulled the weapon with his right hand, while defendant is left-handed.[4] Defendant also makes an unsubstantiated claim that Mr. Lilly's identification testimony improved over time.

In short, nothing put forth by defendant rises to the exceptional level described by the Supreme Court in *Lemmon*. Accordingly, we are not persuaded that the trial court erred in denying the motion for new trial based upon the great weight of the evidence.

Affirmed.

/s/ David H. Sawyer
/s/ Richard Allen Griffin
/s/ Michael J. Talbot

[1] We say that it may have been preserved because it is unclear from the record whether the mistrial request was in reference to the above statement or to a later statement by the prosecutor to defendant

which was not recorded and not audible beyond the defense table. We will accept the premise that the comment and mistrial request relates to that which was set out above.

[2] Apparently, it was not, in fact, the decedent's father because, according to the record, his father is also deceased. In any event, that is how he is referred to in the briefs, so we shall also refer to him as the decedent's father.

[3] Defendant's brief, without citation to the record, claims that two eyewitnesses described the perpetrator as being approximately 5'11" and of slim build, while defendant's brief, again without reference to the record, describes defendant as being 5'5" and "fat with respect to his height."

[4] Again, defendant fails to point to where in the record either of these facts are established.